

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ERIC L. GONZALEZ,

No. C 10-3732 CW (PR)

Plaintiff,

ORDER DENYING PLAINTIFF'S  
MOTION FOR MODIFICATION OF  
JUDGMENT

v.

DR. J. CHUDY, et al.,

(Docket no. 38)

Defendants.

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INTRODUCTION

Plaintiff, a state prisoner incarcerated at the Correctional Training Facility at Soledad, filed this pro se civil rights action pursuant to 42 U.S.C. § 1983, alleging deliberate indifference to his serious medical needs. On October 7, 2011, Plaintiff filed an amended complaint, which is the operative complaint in this action. Doc. no. 8. On March 31, 2013, this Court granted summary judgment in favor of Defendants Drs. Chudy, Sepulveda and Bright. Doc. no. 36. On the same day, judgment was entered in favor of Defendants. Doc. no. 37. On May 9, 2013, Plaintiff filed the instant motion for modification of judgment with respect to Dr. Bright under Federal Rule of Civil Procedure 60(b)(5). Dr. Bright has filed an opposition and Plaintiff has

1 filed a reply. For the reasons discussed below, the Court DENIES  
2 Plaintiff's motion.

3 BACKGROUND

4 The allegations in Plaintiff's amended complaint covered the  
5 time period from August 20, 2009 to September 9, 2010. In his  
6 amended complaint, Plaintiff alleged that Dr. Bright was  
7 deliberately indifferent to Plaintiff's serious medical needs by  
8 denying his request to see a podiatrist on August 25, 2009. In  
9 its March 31, 2013 Order, the Court granted judgment in favor of  
10 Dr. Bright on the grounds that: (1) Dr. Bright reasonably believed  
11 that the swelling in Plaintiff's feet was due to heart issues,  
12 which a podiatrist could not address; and (2) the California  
13 Department of Corrections and Rehabilitation podiatrist was  
14 unavailable for non-emergency situations such as the one presented  
15 by Plaintiff. The Court also held that Dr. Bright was entitled to  
16 qualified immunity.

17 In his motion, Plaintiff argues that the judgment against Dr.  
18 Bright should be modified because "the 'background' assumptions on  
19 which this Court relied in making its determination . . . have  
20 significantly changed." Motion at 3. Plaintiff submits "new"  
21 evidence, which, he argues, shows that Dr. Bright would not have  
22 referred him to a podiatrist in 2009, even if one had been  
23 available. He bases this conclusion on the fact that, on December  
24 14, 2012, Dr. Bright denied Plaintiff's request to see a  
25 podiatrist for his plantar fasciitis condition even though a  
26 podiatrist was available. Motion at 6. Plaintiff filed a 602  
27 appeal. Exh. A. The response at the second appeal level  
28 indicated that "orthopedic consult is not indicated at this time,

1 pending x-rays [sic] results, which will support if orthopedic  
2 shoes/boots are indicated." Exh. A-6. On March 1, 2013, X-rays  
3 revealed that Plaintiff's condition was "chronic." Motion at 7.  
4 According to Plaintiff, chronic ailments are long-lasting and  
5 painful and "impact an individuals [sic] functioning and long term  
6 prognosis." Id. Plaintiff claims that, although Dr. Bright knew  
7 from the X-rays that Plaintiff's condition was "chronic," he still  
8 refused to refer Plaintiff to a podiatrist or an orthopedist.  
9 Plaintiff concludes that Dr. Bright's 2012 conduct shows that he  
10 would have denied Plaintiff an appointment with a podiatrist in  
11 2009, even had a podiatrist been available.

#### 12 DISCUSSION

13 Where the court's ruling has resulted in a final judgment, a  
14 motion for relief from that judgment may be filed under Rule 60(b)  
15 of the Federal Rules of Civil Procedure. Rule 60(b) provides for  
16 relief where one or more of the following is shown: (1) mistake,  
17 inadvertence, surprise or excusable neglect; (2) newly discovered  
18 evidence which by due diligence could not have been discovered  
19 before the court's decision; (3) fraud by the adverse party;  
20 (4) the judgment is void; (5) the judgment has been satisfied or  
21 applying it prospectively is no longer equitable; and (6) any  
22 other reason justifying relief. Fed. R. Civ. P. 60(b); School  
23 Dist. 1J v. ACandS Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).  
24 Plaintiff brings his motion under Federal Rule of Civil Procedure  
25 60(b)(5) on the ground that "it is no longer equitable that the  
26 judgment should have prospective application." Motion at 2-3.  
27 However, because Plaintiff's motion relies on "newly discovered  
28 evidence" and the Court's March 31, 2013 did not provide for

1 prospective relief, the motion is more appropriately brought under  
2 Federal Rule of Civil Procedure 60(b)(2) than Rule 60(b)(5).

3 To justify relief from judgment based on newly discovered  
4 evidence, the plaintiff must demonstrate that the new evidence:  
5 (1) existed at the time the district court entered judgment;  
6 (2) could not have been discovered through due diligence; and  
7 (3) was of such magnitude that production of it earlier would have  
8 been likely to change the disposition of the case. Allen v.  
9 United States, 871 F. Supp. 2d 982, 995 (N.D. Cal. 2012) (citing  
10 Jones v. Aero-Chem Corp., 921 F.2d 875, 878 (9th Cir. 1990)).

11 Plaintiff's pleadings fail to provide "newly discovered  
12 evidence." Plaintiff is correct that Dr. Bright's "new" conduct  
13 took place in 2012, before the Court entered judgment in this case  
14 in 2013, thus meeting the first requirement for relief from  
15 judgment cited in Allen. However, the pleadings do not meet  
16 Allen's second and third requirements for relief. The "new"  
17 evidence does not meet the second Allen requirement because it was  
18 discoverable through due diligence before entry of judgment. In  
19 fact, it was not necessary for Plaintiff to use due diligence to  
20 discover this "new" evidence because he knew about Dr. Bright's  
21 denial of his 2012 request to see a podiatrist when it occurred in  
22 2012. Plaintiff could have submitted these new facts in support  
23 of his opposition to Defendants' motion for summary judgment, but  
24 he did not do so.

25 Second, Plaintiff's "new evidence" does not meet the third  
26 requirement cited in Allen because it is not of such magnitude  
27 that it is likely to change the disposition of his case. The fact  
28 that Dr. Bright did not refer Plaintiff to a podiatrist in 2012,

1 although one was allegedly available, does not establish that Dr.  
2 Bright would not have referred Plaintiff to an available  
3 podiatrist in 2009. Furthermore, the Court also found that Dr.  
4 Bright was not deliberately indifferent in 2009 because he  
5 reasonably believed that the symptoms in Plaintiff's feet and legs  
6 were caused by Plaintiff's heart condition, which could not have  
7 been treated by a podiatrist. The fact that Dr. Bright did not  
8 refer Plaintiff to a podiatrist in 2012 would not change the  
9 conclusion that, in 2009, Dr. Bright reasonably believed that  
10 Plaintiff's foot problems were caused by his heart condition.

11 For all these reasons, Plaintiff's "newly discovered  
12 evidence" does not meet the second and third requirements set out  
13 in Allen, 871 F. Supp. 2d at 995 and, thus, modification of the  
14 judgment is not warranted.

15 CONCLUSION

16 For the foregoing reasons, the Court DENIES Plaintiff's  
17 motion for modification of the judgment. This Order terminates  
18 docket number 38.

19  
20 IT IS SO ORDERED.

21 Dated: 10/18/2013

22   
23 CLAUDIA WILKEN  
24 United States District Judge